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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

MARGO BERKOVITZ; AIDA BERKOVITZ; AND TRISTA BERKOVITZ,
Petitioners,

VS.

THE ISLAMIC REPUBLIC OF IRAN; AND GROUP OF KAVIR,
an agency and instrumentality of
THE ISLAMIC REPUBLIC OF IRAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Courts have subject matter jurisdiction over a wrongful death action brought by American survivors of an American citizen tortured and assassinated in Iran by Iranian authorities in violation of established principles of international law and specified provisions of a treaty signed by Iran and the United States.

2. Whether sovereign immunity under the Foreign Sovereign Immunities Act, 28 U.S.C.A. Sections 1602-1611 must be accorded Iran in such action in the absence of any showing that the Executive Branch has granted it recognition as a "foreign state", as therein defined.

3. Whether a "foreign state", as defined in the Foreign Sovereign Immunities Act, 28 U.S.C.A. Sections 1602-1611, has the ultimate burden of proving its claim to sovereign immunity thereunder.

LIST OF ALL PARTIES

All parties to the proceeding before the Court of Appeals, whose judgment is sought to be reviewed herein, are listed in the caption of this Petition. The United States of America, however, filed a Declaration of Interest in the Court of Appeals and is, therefore, listed as an additional party herein.

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THE ISLAMIC REPUBLIC OF IRAN; AND GROUP OF KAVIR,
an agency and instrumentality of
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Margo Berkovitz; Aida Berkovitz; and Trista Berkovitz, hereby petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, (App; *infra*, A-20) is reported at 735 F2d 329. The District Court issued no opinion and its decision and judgment (App. *infra*, A-39, A-42) were not reported.

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals (App., *infra*, A-45) was entered on May 1, 1984. Timely Petition for Rehearing was filed and, upon amendment by the Court of Appeals of its earlier judgment, denied on June 26, 1984 (App. *infra*, A-47). This Court has jurisdiction under 28 U.S.C.A. Section 1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS

This Petition involves the following statutes and treaty, which are set forth verbatim in the Appendix (App., *infra*, A-49)

28 U.S.C.A. 1330
28 U.S.C.A. 1331
28 U.S.C.A. 1332
28 U.S.C.A. 1332(a)(2)
28 U.S.C.A. 1602
28 U.S.C.A. 1603
28 U.S.C.A. 1605
42 U.S.C.A. 1981

Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, 8 U.S.T. 899, TIAS 3853

STATEMENT OF THE CASE

1. Proceedings in the Court Below

This is a request for review of the judgment of the Court of Appeals for the Ninth Circuit affirming an order

of the United States District Court for the Northern District of California dismissing Petitioners' action. The Amended Complaint filed by Petitioners in the District Court on June 13, 1980, sought damages against The Islamic Republic of Iran (Iran) and Group of Kavir (Kavir) for the wrongful death of Martin Berkovitz in Iran on January 14, 1979.[1] The District Court's jurisdiction was invoked under 28 U.S.C.A. Sections 1330 (action against foreign state), 1331 (federal question), 1332 (diversity) and 1602 (sovereign immunity). Iran never answered the Amended Complaint. Instead, on November 29, 1982, Iran filed a motion for dismissal as to both Iran and Kavir alleging lack of jurisdiction, improper venue and extinguishment of the Petitioners' claims under the Embassy Hostage Agreement concluded by President Carter in 1981. Petitioners filed a timely opposition. The District Court's Order, entered January 12, 1983, granted the motion as to the first and third grounds, and on May 11, 1983, the Court entered a final Judgment dismissing the action.

Petitioners timely appealed the District Court's judgment. On May 1, 1984, that judgment was affirmed by the Court of Appeals which, on June 26, 1984, also denied Petitioners' timely request for rehearing.

2. Factual Background

Petitioners are the surviving spouse and children of Martin Berkovitz, a California citizen and former United

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[1]The Amended Complaint also named as defendants certain designated officers of the United States Government; however, these defendants were later dismissed upon stipulation. The review requested herein questions only the validity of the dismissal as to Iran and Kavir.

States Air Force Officer privately employed as an American National in Iran, who was allegedly murdered in that country on January 14, 1979, by political dissidents and organizers of the present Iranian government. At the time of his death, Martin was working as an engineering executive for Parsons Jurden Corporation of Pasadena, California, which was engaged in a copper mine project for the Government of Iran. Shortly after the murder a photograph of Martin in military uniform was posted on public display together with a note signed by defendant, Kavir, which claimed credit for the killing. The note adverted to Martin's Jewish background, accused him of being an American spy, and warned other Americans to leave the country. The murder was prominently reported in the American press.

The Amended Complaint alleged complicity in the murder by Iran and Kavir, its alleged instrumentality. The claim against these two defendants was for the wrongful death and was grounded in (1) the criminal conspiracy itself, which had as its ultimate objective the wholesale stampede of all American nationals from Iran, and (2) a 1957 trade treaty between the United States and Iran which sought to foster business relations between the two signatories by extending to nationals of each guarantees of protection, security and humane physical treatment within the territories of the other. The causes of action alleged were based on this conspiracy, breach of the treaty and waiver of sovereign immunity by Iran and Kavir.

In a series of executive orders signed January 19, 1981, the Carter Administration concluded an agreement with Iran releasing the Embassy hostages seized in that country

on November 4, 1979. On such Order, No. 12283, purported to extinguish the claims of U.S. nationals resulting from popular movements in the course of the Islamic Revolution in Iran "which were not an act of the Government of Iran."

On January 7, 1983, Iran successfully moved the District Court for dismissal of the Complaint as to both Iran and Kavir for lack of jurisdiction due to sovereign immunity from suit, and Petitioners' failure to state a claim for relief due to extinguishment thereof by the Hostage Agreement. The Court of Appeals affirmed and this Petition seeks review of that decision.

REASONS FOR GRANTING THE PETITION

1. The Opinion of the Ninth Circuit Court of Appeals Abridges Equal Access to the Courts by Basing Acceptance of Jurisdiction on the Citizenship of the Litigants, Grants Sovereign Immunity for Official Torture and Murder, Disregards an Unchallenged Basis for Diversity Jurisdiction Over the Group of Kavir, and Directly Conflicts With Existing Case Law

(a) Equal Access to the Courts

The Ninth Circuit Court's opinion, filed May 1, 1984 and amended June 26, 1984, holds that subject-matter jurisdiction in this case depends solely upon the citizenship of petitioners' decedent, Martin Berkovitz. This holding is constitutionally impermissible, and conflicts with existing federal case law.

In *Filartiga v. Pena-Irala* (1980) 630 F.2d 876, the Second Circuit Court of Appeals held that federal courts have subject-matter jurisdiction over a private tort action brought by an alien against foreign government officials

for acts of torture perpetrated in the foreign country. The Court reasoned that deliberate torture performed under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties, that the law of nations became part of the common law of the United States upon the adoption of the Constitution, and that once personal jurisdiction of the torturer is obtained, the Alien Tort Statute (28 U.S.C.A. § 1350) provides federal jurisdiction.

In *Filartiga,* all of the parties were Paraguayan citizens. Although the Court specifically found that the Alien Tort Statute afforded a basis for jurisdiction, it further recognized that its reasoning could also sustain jurisdiction under the general federal question provision, 28 U.S.C.A. § 1331. *Filartiga v. Pena-Irala* (1980) 630 F.2d 876, 887, n. 22. Section 1331 was alleged as one of the bases of federal jurisdiction in the Amended Complaint filed by petitioners herein.

Siderman deBlake v. The Republic of Argentina (U.S.D.C., Central Dist. of Ca., 1984, No. 82-1772-RMT (MCx)) is a similar torture case brought in the United States District Court in Los Angeles, California, by an Argentine citizen, currently a California resident, against Argentina in which the Court, again, found subject-matter jurisdiction by applying the "law of nations" concept. (App., *infra.,* .....). That case is still pending. Although the opinion of the District Court is not binding, it is another application of the law expounded by the Second Circuit in *Filartiga.*

The only distinction between *Filartiga* and *Siderman* on the one hand, and the case at bar on the other, as far as the

issue of subject-matter jurisdiction is concerned, is that of the citizenship of the plaintiff. That distinction creates an inconsistent result: a tortured foreigner will be allowed to sue his tormentor in federal court while a similarly tortured American citizen will not. 42 U.S.C.A. § 1981 guarantees all persons within the jurisdiction of the United States the same right to sue. That right is denied Petitioners herein if subject-matter jurisdiction turns solely on the citizenship of their decedent.

It is evident that every person in this country should have an equal right with every other to resort to the courts for enforcement of his rights, and that a discrimination between different classes of litigants that is merely arbitrary is in its nature a denial of that right and of equality before the law. That equality exists only if American citizens are accorded the same rights American courts now grant aliens which, as far as subject-matter jurisdiction is concerned, can only be achieved if this Court follows the broader principle stated in *Filartiga:* that jurisdiction over controversies involving claimed violations of human rights abroad "arise under" the Constitution within the meaning of the general federal question jurisdiction of 28 U.S.C.A. § 1331.

(b) Jurisdiction Under the Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act, 28 U.S.C.A. §§ 1602-1611, provides, *inter alia,* as follows:

> "Section 1605, General exceptions to the jurisdictional immunity of a foreign state
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

> (2) in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;"

The preamble to the Treaty of Amity, Economic Relations and Consular Rights Between the United States of America and Iran, 8 U.S.T. 899, TIAS 3853, states, as one of the purposes of the signatories, that of "encouraging mutually beneficial trade and investments and closer economic intercourse between their peoples." There can be no question that the Islamic revolution in Iran shattered this treaty; Petitioners alleged in their Amended Complaint that decedent's murder was a planned part of that revolution. His torture and assassination as a Jewish-American ex-military officer and representative of United States commercial interests in Iran was not simply fortuitous and coincidental with the revolution, but a symbol and a warning of its aims and intentions and the equivalent of a declaration of war against this country and its nationals in Iran. No act could more powerfully signify Iran's breach of its Treaty obligations to the United States than the official capture, torture and murder of one of our more highly-regarded business emissaries.[2] Since the "breach of an agree-

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[2]In addition, Article 2 § 4 and Article 4 § 1 of the Treaty of Amity require Iran to provide American nationals within its territory with reasonable, humane, fair and equitable treatment. Article 4 § 2 and § 3 provide that their property, including dwellings, receive protection and security at least equal to that entitled by international law. Thus, Iran specifically obligated itself to the United States to abide not only by its own legal precepts as far as human rights are concerned, but by the directives of international law as well. It has shown no reason why it should not be held accountable in United States courts for breach of that obligation.

ment is necessarily performed 'in connection with' that agreement . . .", *Texas Trading and Milling Corp. v. Republic of Nigeria* (2nd Cir. 1981) 647 F.2d 300, 311 n.30, *cert. den.* 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982), Iran's actions, as alleged in petitioners' Amended Complaint, constituted commercial activity within the provisions of 28 U.S.C.A. § 1605(a)(2). Although the personal effect of those actions fell upon decedent himself, their designed, direct, and ultimately successful, effect was to cause the wholesale stampede of Americans from Iran, total disruption of trade relations with the United States and severance of diplomatic ties between the two countries. Hence, the action falls within the exception to sovereign immunity specified in Section 1605(a)(2).

(c) Diversity Jurisdiction Over the Group of Kavir

28 U.S.C.A. § 1332(a)(2) confers jurisdiction over disputes between citizens of a state and citizens or subject of a foreign state. Kavir is an entity composed of individuals; it has never been disputed that those individuals are citizens or subjects of Iran. The fact that Kavir may also be a foreign state within the meaning of 28 U.S.C.A. § 1603 does not preclude jurisdiction under the diversity provisions of § 1332(a)(2) because that section is not limited by the grant of jurisdiction contained in § 1603. As reasoned by Judge Shapiro in *Lonan v. Companhia De Navagacao Lloyd Basiliero* (E.D.Pa. 1979) 85 FRD 71:

> Section 1603 of Title 28, a section of the Foreign Sovereign Immunities Act, defines "foreign state" to include any entity a majority of whose shares is owned by a foreign state, but it explicitly states the definition is "for (the) purposes of this chapter"; § 1603 is found in

> Chapter 97. Section 1332(a)(2) of Title 28, which confers jurisdiction in this case, is found not in Chapter 97 but in Chapter 85. New § 1330, also incorporated into the Code by the Foreign Sovereign Immunities Act, is likewise found in Chapter 85 of Title 28. In conferring district courts with original jurisdiction of nonjury civil actions against a "foreign state," § 1330 specifically states that the "foreign state" is as defined in § 1603(a); § 1332(a)(4) also states that "foreign state" is as defined in § 1603(a). But no such limiting definition is found in § 1332(a)(2). Section 1332(a)(2) does not incorporate by reference the § 1603(a) definition of "foreign state;" neither is § 1332(a)(2) a part of Chapter 97 to which the definition of § 1603(a) is stated to apply. Therefore, the jurisdictional grant of § 1332(a)(2) is not limited by § 1603. 85 F.R.D. at 72-73.

It follows that Kavir is a citizen or subject of a foreign state under 28 U.S.C.A. § 1332(a)(2).

2. Iran as It Is Presently Constituted, Has Never Attempted to Show That It Is a "Foreign State"

Section 1603 of the Foreign Sovereign Immunities Act, 28 U.S.C.A. §§ 1602-1611, defines "foreign state" as follows:

> "(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or

other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country."

The Foreign Sovereign Immunities Act provides no guidelines for judicial determination of whether or not a particular group claiming sovereign immunity qualifies as a "foreign state". Certainly the issue transcends the pleadings, for it involves the question of recognition or non-recognition of governments. The refusal to recognize a government has a unique legal aspect:

"It signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control."

Banco Nacional DeCuba v. Sabbatino (1964) 376 U.S. 398, 410, 84 S.Ct. 923, 931, 11 L.Ed. 2d 804.

The question has historically been left for the Executive branch to answer. As stated in *The Penza* (District Court, E.D. N.Y. 1921) 277 F. 91:

"The courts must follow and may not lead the executive. They have no authority to institute an original inquiry into conditions of a foreign state of government. Which is a sovereign, de jure or de facto, of a territory is not a judicial, but a political, question for determination."

277 F. at 92.

See also *Transportes Aeroes De Angola v. Ronair, Inc.* (D. Del. 1982) 544 F.S. 858, 862; *Banco National De Cuba v. Sabbatino, supra; National City Bank v. Republic of*

China (1955) 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389; *Jones v. United States* (1890) 137 U.S. 202, 11 S.Ct. 80, 34 L.Ed. 691; *Murarka v. Bachrack Bros.* (2nd Cir 1954) 215 F2d 547; *Chang v. Northwestern Memorial Hospital* (N.D. Ill. 1980) 506 F.S. 975; *Windert Watch Co., Inc. v. Remex Electronics, Ltd.* (S.D. N.Y. 1979) 468 F.S. 1242; *Akio Kuwahara v. Acheson* (S.D. Cal. 1951) 96 F.S. 38; *Klausner v. Levy* (E.D. Va. 1949) 83 F.S. 599.

In all of the foregoing cases either formal or diplomatic recognition by the United States was the criterion used for determining the existence or non-existence of a foreign state. In *Murarka* India was determined to have achieved de facto recognition and foreign statehood as early as February 1947, when an exchange of ambassadors was made, even though formal recognition did not take place until six months later. *Murarka v. Bachrack Bros., supra* 215 F.2d at 552. Conversely, in *Windert*, the court pointed to non-recognition, as evidenced by an absence of diplomatic relations, in holding that Hong Kong was not a foreign state. *Windert Watch Co., Inc. v. Remex Electronics, Ltd., supra* 468 F.S. at 1245.

Wigmore has stated the issue concisely:

> "Whether a Court will take judicial notice of the existence of a foreign state, or the legitimacy of a foreign government, is really a question whether, as a matter of substantive law and judicial functions, a foreign State or government will in domestic courts be treated as existing only so far as the Executive treats it. Here it is conceded that *the Executive's recognition is the determining element.*"
>
> *Wigmore on Evidence*, 3rd ed., Vol IX, Section 2566 (emphasis added).

Although the Courts are bound by the determination of the Executive Department as to whether or not Iran is a "foreign state" entitled to claim immunity, they should not be left to speculate what that determination is.[3] The proper application of the rule is found in *Jones v. United States* (1890) 137 U.S. 202, 216, 11 S.Ct. 80, 85, 34 L.Ed. 697:

> "In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem trustworthy. . . . As to international affairs, such as the recognition of a foreign government, or of the diplomatic character of a person claiming to be its representative, they may inquire of the foreign office or the department of state. . . ."

In the absence of any evidence that the Executive has granted recognition to Iran as a foreign state, Iran has no claim to sovereign immunity under the Foreign Sovereign Immunities Act.[4]

3. Iran Has Neither Claimed, Nor Proven, a Right to Sovereign Immunity in This Case

Iran's claim of sovereign immunity under the Foreign Sovereign Immunities Act was advanced solely by its

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[3]In fact, at oral argument before the Ninth Circuit, the Assistant United States Attorney specifically declared that the United States does *not* recognize The Islamic Republic of Iran.

[4]It should be noted that the mode of according recognition is not material, provided there be an unequivocal act indicating clearly that the new state is dealt with as such and is deemed to be entitled to exercise the privileges of statehood in the society of nations. The entering into a formal diplomatic or conventional relationship is conduct of such a character. 1 Hyde, International Law, 2nd ed. Section 37, pp. 149-150.

attorneys, and by no one else purporting to represent Iran in any official capacity. This is clearly inadequate.

> "It has been consistently held that a claim of sovereign immunity can only be made by a representative of the sovereign having authority to represent and speak for the sovereignty. The Exchange v. McFaddon, supra; Berizzi Bros. v. The Pesaro, supra; In re Muir, 254 U.S. 522, 41 S.Ct. 185, 65 L.Ed. 383; The Roseric (D.C.) 254 F. 154; The Maipo (D.C.) 252 F. 627.
>
> It has been expressly held that a claim of sovereign immunity cannot be made by . . . a private attorney. Lyders v. Lund (D.C.) 32 F.(2d) 308, 309; The Sao Vicente 260 U.S. 151, 43 S.Ct. 15, 67 L.Ed. 179; The Sao Vicente (C.C.A. 295 F. 829; In re Muir supra; The Anne, 3 Wheat. 435, 4 L.Ed. 428; The Gul Djemal, 264 U.S. 90, 44 S.Ct. 244, 68 L.Ed. 574."
>
> *United States of Mexico v. Rask* (D.C. Cal. 1931) 4 P.2d 981, 989.

Thus, any purported claim to sovereign immunity is wholly ineffectual.

Moreover, the burden of sustaining any such claim is on Iran. The Ninth Circuit itself has so stated:

> "Ordinarily, the plaintiff has the burden of establishing jurisdictional requirements [citations]. . . . However, the legislative history of the F.S.I.A. indicates that because sovereign immunity is a defense to be specially pleaded, the foreign state has the ultimate burden of proving its claim of immunity. [citations] . . . Once plaintiffs have alleged a basis for jurisdiction, as appellants did below, the burden shifts to the foreign state to prove immunity."
>
> *Olsen By Sheldon v. Government of Mexico* (9th Circ. 1984) 792 F.2d 641, 644-645.

The opinion of the Ninth Circuit in the case at bar is at odds with the foregoing rule. The Court's slip opinion began the third Paragraph of Part II thusly (App., *infra*, A-1): "Therefore, the heirs must demonstrate that Iran is not entitled to sovereign immunity." That sentence was deleted in the Order Amending Opinion and Denying Rehearing, filed June 26, 1984. That was the only change made in the Amended Opinion. Since no evidence was ever presented by Iran to support any claim of sovereign immunity, however presented, it is clear that, despite the deleted sentence, the Ninth Circuit's rationale in granting sovereign immunity was that Petitioners had failed to show that it did not exist. Consequently, the Ninth Circuit's opinion in this case directly conflicts with its own holding in *Olsen*.

CONCLUSION

In view of the foregoing, it is respectfully requested that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MASTERSON, CALHOUN, LUNDBERG & Judge

By CHRISTOPHER E. JUDGE
Attorneys for Petitioners

(Appendix follows)

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARGOT BERKOVITZ, et al, Plaintiffs-Appellants, v. THE ISLAMIC REPUBLIC OF IRAN, et al, Defendants-Appellees.	)	No. 83-2011 D.C. No. CV 80-0097 EFL OPINION

Appeal from the United States District Court for the Northern District of California
Eugene F. Lynch, District Judge, Presiding
Argued and Submitted December 13, 1983.

BEFORE: WALLACE and BOOCHEVER, Circuit Judges, and WYZANSKI,* District Judge.

WALLACE, Circuit Judge:

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* Honorable Charles Edward Wyzanski, Jr., United States District Judge, District of Massachusetts, sitting by designation.

The wife and children of Martin Berkovitz (the heirs) appeal from a district court order dismissing their wrongful death action against the Islamic Republic of Iran and Kavir, an Iranian revolutionary group. The only questions raised are questions of law reviewable by us de novo. We have jurisdiction of this appeal under 28 U.S.C. Section 1291, and affirm the dismissal on the grounds of lack of subject matter jurisdiction and sovereign immunity. See 28 U.S.C. Section 1330.

I

Berkovitz, a retired United States Air Force officer, worked in Iran for a California engineering firm.

During 1979 the firm handled a copper mining project for the Iranian government. That January, Berkovitz was brutally murdered.

Kavir apparently implicated itself in his murder by its distribution of posters pointing out Berkovitz's Jewish background, accusing him of spying, and warning him or other Americans to leave Iran. The heirs, seeking damages for Berkovitz's wrongful death, sued Iran and Kavir as an instrumentality of Iran. In part of their complaint later voluntarily dismissed with prejudice, they also sued various United States officials in hopes of securing a priority on Iranian assets and preventing any government action that might restrict a wrongful death recovery.

Iran moved to dismiss the complaint on grounds of lack of jurisdiction, improper venue, and failure to state a claim. Iran argued it was immune from suit and that the agreement which led to the release of the American hostages in Iran settled this wrongful death claim. See Declaration of the Government of the Democratic and Popular Republic of Algeria, General Principle B, Jan. 19, 1981, 20 I.L.M. 224 (Algerian Declaration), enforced by Executive Order 12283, 46 Fed. Reg. 7927 (Jan. 23, 1981). The district court granted Iran's motion on grounds of sovereign immunity and prior settlement through the Algerian Declaration.

The heirs have treated Kavir as simply an extension of Iran. Our analysis

of subject matter jurisdiction over Iran also includes Kavir.

II

The heirs have treated Iran as a foreign state throughout this litigation. In their reply brief on appeal, however, they argue for the first time that it is not a foreign state under the Foreign Sovereign Immunities Act of 1976. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. Sections 1330, 1332(a)(2)(3)(4), 1391(f), 1441(d), 1602-11) (FSIA). Although we need not address this argument because of its untimely introduction, see, e.g., Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 862 (9th Cir. 1982), we observe that it lacks weight. We have recently treated Iran as a foreign state

for purposes of the FSIA. See McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983).

The heirs alleged several statutory bases for the district court's jurisdiction. Only one, 28 U.S.C. Section 1330, provides subject matter jurisdiction of private suits against foreign states, see McKeel v. Islamic Republic of Iran, 722 F.2d at 585-87; see generally H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 13-14, reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6611-13 ("jurisdiction in actions against foreign states is comprehensively treated by the new section 1330 . . . ."). Section 1330(a) provides "district courts shall have original jurisdiction . . . of any nonjury civil action against a foreign

state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." See generally Verlinden, B.V. v. Central Bank of Nigeria, 103 S. Ct. 1962, 1967 n.5 (1983). As section 1330 indicates, sovereign immunity is not merely a defense under the FSIA. Its absence is a jurisdictional requirement. See id. at 1971 n.20.

Therefore, the heirs must demonstrate that Iran is not entitled to sovereign immunity. The heirs argue Iran lacks sovereign immunity in this suit either by virtue of 28 U.S.C. Section 1605(a)(1), (2), or (5), or by virtue of the Treaty of Amity, Economic Relations,

and Consular Rights, August 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. 3853 (Treaty of Amity).

They initially claim a lack of sovereign immunity flows from the "private" and unfriendly nature of political assassinations. This novel theory, apparently grounded in the 28 U.S.C. Section 1605 (a)(1) allowance for implicit waivers of immunity, has no merit. Cf. Banco Nactional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964) (rejecting an argument that because "relations between the United States and Cuba manifest such animosity that unfriendliness is clear," Cuba should not have access to United States courts). The claim of no sovereign immunity under 28 U.S.C. Section 1605 (a)(5) also lacks merit.

Subsection (a)(5) requires "personal injury, or death. . . occurring in the United States . . . ." Berkovitz died in Iran. These arguments disposed of, we address the two remaining potentially meritorious grounds for an exception to sovereign immunity, and thus the availability of jurisdiction under section 1330: first section 1605(a)(2) and then the Treaty of Amity.

III

The FSIA includes as a basic principle that "states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned." 28 U.S.C. Section 1602. See McKeel v. Islamic Republic of Iran, 722 F. 2d at 587 n.6. Subsection 1605(a)(2) expands on this theme to provide an

exception to sovereign immunity in cases based on "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere [when] that act causes a direct effect in the United States."

Subsection 1603(d) makes clear that "commercial activity" depends on the nature of the activity, not its purpose. Berkovitz's murder, no matter what its purpose, does not have the nature of commercial activity. The legislative history of the FSIA, however, states that "a foreign government's. . . employment . . . of laborers" or contract "to construct a government building" are examples of commercial activity of the state. H.R. Rep. 94-1487, supra, at 16,

1976 U.S. Code Cong. & Ad. News at 6615. If we assume by analogy that Berkovitz's employment, through his company's contract with Iran, meets the requirements of a commercial activity, the act of murder might then become the "act" mentioned in subsection 1605(a)(2). We need not reach this question, however, because the two remaining elements for an exception to sovereign immunity under this clause do not exist. The act of murder did not occur "in connection with" Berkovitz's job, and the act of murder did not "cause[] a direct effect in the United States." See 28 U.S.C. Section 1605(a)(2).

In their complaint, the heirs allege Berkovitz's murder was part of a general plan of political revolution in Iran. Nothing about his murder, however,

related to his job, except to the extent his job had brought him to Iran in the first place. This slight connection between the murder and the commercial activity will not suffice for purposes of subsection 1605(a)(2). Cf. Texas Trading & Milling Corp. v. Republic of Nigeria, 647 F.2d 300, 311 n.30 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982) ("Breach of an agreement is necessarily performed 'in connection with' that agreement, or with a series of similar agreements."); accord Velidor v. L/P/G Benghazi, 653 F.2d 812, 820 (3d Cir. 1981), cert. dismissed, 455 U.S. 929 (1982).

The political act that caused Berkovitz's death occurred in Iran. Its direct effect was his death in Iran. As

the district court in Verlinden, B.V. v. Central Bank of Nigeria stated:

> When the victim of a foreign state's tortious conduct is an American citizen injured abroad, the sovereign is protected by immunity and there is no jurisdiction in the American courts. In such cases the injury to the victim's bereaved relatives living in the United States is not sufficiently "direct" or "substantial" to support the assertion of Federal jurisdiction.

488 F. Supp. 1284, 1298 (S.D.N.Y. 1930) (footnote omitted), aff'd on other grounds, 647 F.2d 320 (2d Cir. 1981), rev'd on other grounds, 103 S. Ct. 1962 (1983); accord Harris v. VAO Intertourist, Moscow, 481 F. Supp. 1056, 1065 (E.D.N.Y. 1979); Upton v. Empire of Iran, 459 F. Supp. 264, 266 (D.D.C. 1978), aff'd without opinion, 607 F.2d 494 (D.C. Cir. 1979). Cf. In re Rio Grande Transport, Inc., 516 F. Supp. 1155, 1163-64 & n.9 (S.D.N.Y. 1981)

(where the federal courts have jurisdiction of one claim in an FSIA action that includes pendent wrongful death claims under 28 U.S.C. Section 1605(a)(2) from the death of seamen outside the United States, the court has jurisdiction of those pendent claims even though the deaths did not produce direct effects in the United States). See also Hanoch Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 549-50 n.3 (D.D.C. 1981); H.R. Rep. No. 94-1487, supra, at 19, 1976 U.S. Code Cong. & Ad. News at 6618 (referring to section 18, Restatement of the Law (Second), Foreign Relations Laws of the United States); Restatement of the Law (Second), Foreign Relations Laws of the United States Section 18(b)(iii) (1965) (emphasizing "direct and foreseeable

result[s]"). We agree; Berkovitz's murder, although the cause of great suffering among his family, did not have that type of direct effect in the United States which would permit jurisdiction by application of 28 U.S.C. Section 1605(a)(2).

VI

The heirs apparently claim the Treaty of Amity constitutes an express waiver of Iranian sovereign immunity for all harms flowing from wrongs against foreign nationals engaged in commercial activity in Iran. If such an express waiver under Section 1605(a)(1) existed by operation of the treaty, jurisdiction would be established under Section 1330(a) because Iran would "not [be] entitled to immunity under Sections 1605-1607," and,

in addition, because a "foreign state is not entitled to immunity . . . under any applicable international agreement." 28 U.S.C. Section 1330(a). The Treaty of Amity, however, will not trigger these provisions.

The Treaty of Amity allows United States nationals to enter Iran "for the purpose of carrying on trade [between Iran and the United States] . . and engaging in related commercial activities." Treaty of Amity, supra, art. II, Paragraph 1. It required Iran to give the "most constant protection and security" to Americans in Iran, id. at art. ii, Paragraph 4, and to accord them "fair and equitable treatment," id. at art. IV, Paragraph 1. In recent years, the spirit of the agreement expressed in

these articles has been decimated by revolutionary politics. The treaty's only express provision for waiver of sovereign immunity, however, remains in article XI, paragraph 4: "No enterprise of [Iran] . . . including corporations, associations, and government agencies and instrumentalities . . . shall, if it engages in commercial, industrial, shipping or other business activities within [the United States] . . . claim or enjoy . . . immunity [in the United States] . . . from . . . suit . . . ."

This limited waiver of sovereign immunity extends only to enterprises of Iran, not Iran itself. See Security Pacific National Bank v. The Government and State of Iran, 513 F.

Supp. 864, 880 n.23 (C.D. Ca. 1981); cf. Gibbons v. Republic of Ireland, 532 F. Supp. 668, 672 (D.D.C. 1982) (virtually identical treaty provision) ("This provision clearly waives the immunity of 'enterprises' of the Republic of Ireland owned by the state but is silent as to the sovereign itself."). Furthermore, this limited waiver extends only to enterprises "doing business" in the United States. See Harris Corp. v. National Iranian Radio and Television, 691 F. 2d 1344, 1350 (11th Cir. 1982); see also Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1107-08 n.4 (S.D.N.Y. 1982) (virtually identical treaty provision). The heirs have not alleged liability on the part of any Iranian enterprise doing business in the United States. The

Treaty of Amity therefore has no application to jurisdiction over their wrongful death action.

V

We conclude that neither the FSIA nor the Treaty of Amity provides an exception to sovereign immunity that will sustain jurisdiction in this case under 28 U.S.C. Section 1330. Because we hold the district court lacked jurisdiction, we do not reach the question whether the Algerian Declaration also precludes the heirs' suit.

AFFIRMED.

Margot BERKOVITZ, et al,
Plaintiffs-Appellants,

v.

The ISLAMIC REPUBLIC OF IRAN, et al, Defendants-Appellees.

No. 83-2011

United States Court of Appeals
Ninth Circuit

Argued and Submitted Dec. 13, 1983.

Decided May 1, 1984.

As Amended on Denial of Rehearing
June 26, 1984

Appeal from the United States District Court for the Northern District of California.

Before WALLACE and BOOCHEVER, Circuit Judges, and WYZANSKI, District Judge.

WALLACE, Circuit Judge:

The wife and children of Martin Berkovitz (the heirs) appeal from a district court order dismissing their wrongful death action against the Islamic Republic of Iran and Kavir, an Iranian revolutionary group. The only questions raised are questions of law reviewable by us de novo. We have jurisdiction of this appeal under 28 U.S.C. Section 1291, and affirm the dismissal on the grounds of lack of subject matter jurisdiction and sovereign immunity. See 28 U.S.C. Section 1330.

I

Berkovitz, a retired United States Air Force officer, worked in Iran for a California engineering firm.

During 1979 the firm handled a copper mining project for the Iranian government. That January, Berkovitz was brutally murdered.

Kavir apparently implicated itself in his murder by its distribution of posters pointing out Berkovitz's Jewish background, accusing him of spying, and warning him or other Americans to leave Iran. The heirs, seeking damages for Berkovitz's wrongful death, sued Iran and Kavir as an instrumentality of Iran. In part of their complaint later voluntarily dismissed with prejudice, they also sued various United States officials in hopes of securing a priority on Iranian assets and preventing any government action that might restrict a wrongful death recovery.

Iran moved to dismiss the complaint on grounds of lack of jurisdiction, improper venue, and failure to state a claim. Iran argued it was immune from suit and that the agreement which led to the release of the American hostages in Iran settled this wrongful death claim. See Declaration of the Government of the Democratic and Popular Republic of Algeria, General Principle B, Jan. 19, 1981, 20 I.L.M. 224 (Algerian Declaration), enforced by Executive Order 12283, 46 Fed. Reg. 7927 (Jan. 23, 1981). The district court granted Iran's motion on grounds of sovereign immunity and prior settlement through the Algerian Declaration.

The heirs have treated Kavir as simply an extension of Iran. Our analysis

of subject matter jurisdiction over Iran also includes Kavir.

II

The heirs have treated Iran as a foreign state throughout this litigation. In their reply brief on appeal, however, they argue for the first time that it is not a foreign state under the Foreign Sovereign Immunities Act of 1976. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. Sections 1330, 1332(a)(2)(3)(4), 1391(f), 1441(d), 1602-11) (FSIA). Although we need not address this argument because of its untimely introduction, see, e.g., Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 862 (9th Cir. 1982), we observe that it lacks weight. We have recently treated Iran as a foreign state

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Treaty of Amity therefore has no application to jurisdiction over their wrongful death action.

V

We conclude that neither the FSIA nor the Treaty of Amity provides an exception to sovereign immunity that will sustain jurisdiction in this case under 28 U.S.C. Section 1330. Because we hold the district court lacked jurisdiction, we do not reach the question whether the Algerian Declaration also precludes the heirs' suit.

AFFIRMED.

Chris Gasparich
William W. Schofield
Eric G. Wallis
CROSBY, HEAFEY, ROACH & MAY
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(415) 834-4820

Attorneys for Defendant
Islamic Republic of Iran

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARGOT BERKOVITZ, et al., No. C 80 0097 EFL

Plaintiffs,

vs. ORDER DISMISSING COMPLAINT

THE ISLAMIC REPUBLIC OF IRAN, et al.,

Defendants.
_____/

The motion of Defendant Islamic Republic of Iran to dismiss Plaintiffs' Amended Complaint was heard on January 7,

1983. William W. Schofield of CROSBY, HEAFEY, ROACH & MAY Professional Corporation appeared for Defendant Islamic Republic of Iran; Christopher E. Judge of Masterson, Calhoun, Lundberg & Judge appeared for Plaintiffs; Judith A. Whetstine, Assistant United States Attorney appeared for Defendant United States of America. Upon consideration of the briefs of the parties and the argument of counsel,

IT IS ORDERED that the Amended Complaint shall be, and hereby is, dismissed as to Defendant Islamic Republic of Iran and Group of Kavir (an alleged agency or instrumentality of the Islamic Republic of Iran) on the grounds that (a)

pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Sections 1602, et seq., Defendants are immune from the jurisdiction of this Court for the acts and injuries alleged in the Amended Complaint, and (b) Plaintiffs' claims have been settled by the United States of America by international agreement and therefore the Amended Complaint fails to state a claim upon which relief can be granted.

DATED: Jan 12 1983

EUGENE F. LYNCH
EUGENE F. LYNCH
UNITED STATES DISTRICT JUDGE

ORDER DISMISSING COMPLAINT

CHRISTOPHER E. JUDGE, ESQUIRE
MASTERSON, CALHOUN, LUNDBERG & JUDGE
2566 Macdonald Avenue
P.O. Box 236, Station A
Richmond, California 94808-0236
(415) 237-0100

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARCOT BERKOVITZ, et al.,

Plaintiffs,

v.

THE ISLAMIC REPUBLIC OF IRAN; GROUP OF KAVIR, an agency and instrumentality of The Islamic Republic of Iran; GEORGE P. SCHULTZ, in his capacity as Secretary of State of the United States; DONALD T. REGAN, in his capacity as Secretary of the Treasury of the United States; PAUL A. VOLCKER, in his capacity as Chairman of the

Action No. C-80-0097 EFL

JUDGMENT DISMISSING ACTION

Federal Reserve Board of the United States; C. T. CONOVER, in his capacity as Comptroller of the Currency , an agency within the Department of the Treasury; and DENNIS O'CONNELL, in his capacity as Director of the Office of Foreign Assets Control, an agency within the Department of the Treasury,

Defendants. /

Plaintiffs' Amended Complaint in the above-entitled action having been dismissed upon Order as to defendants, THE ISLAMIC REPUBLIC OF IRAN AND GROUP OF KAVIR, and having been dismissed with prejudice upon Stipulation as to the remaining defendants, by virtue of which the Amended Complaint has now been dismissed as to all defendants,

///

IT IS HEREBY ORDERED that the herein action be, and is dismissed.

DATED: May 9, 1983

EUGENE F. LYNCH
EUGENE F. LYNCH
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARGOT BERKOVITZ, et al,	)	No. 83-2011
	)	CV 80-0097-
Plaintiffs-Appellants,	)	EFL
	)	
v.	)	
	)	
THE ISLAMIC REPUBLIC OF IRAN, et al,	)	
	)	
Defendants-Appellees.	)	
	)	

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now

here ordered and adjudged by this Court that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 1, 1984.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARGOT BERKOVITZ, et al.,	)	No. 83-2011
	)	
	)	D.C. No.
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	)	EFL
-vs-	)	
	)	
THE ISLAMIC REPUBLIC OF IRAN, et al.,	)	ORDER
	)	
Defendants-Appellees.	)	
	)	

ORDER AMENDING OPINION AND DENYING REHEARING

Appeal from the United States District Court for the Northern District of California

Before: WALLACE and BOOCHEVER, Circuit Judges, and WYZANSKI,*District Judge

*Honorable Charles Edward Wyzanski, Jr., United States District Judge, District of Massachusetts, sitting by designation.

The Opinion filed in the above matter on May 1, 1984, is amended as follows:

The sentence, "Therefore, the heirs must demonstrate that Iran is not entitled to sovereign immunity," found at slip op. page 1974, first column, bottom of the page (typed opinion, page 4, lines 4 and 5), is deleted.

With such amendment, appellants' petition for rehearing is denied.

Constitutional, Statutory and Other Provisions Involved

1. 28 U.S.C.A. Sections 1330, 1331 and 1332 provide in relevant part as follows:

Section 1330. Actions against foreign states

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

Section 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Section 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between --

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or

subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

2. The Foreign Sovereign Immunities Act, 28 U.S.C.A., Sections 1602-1611, provides in relevant part as follows:

Section 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in

connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

Section 1603. Definitions

For purposes of this chapter --

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity --

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the

United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States;

Section 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time

of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Section 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere;

or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United

States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to --

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

3. 42 U.S.C.A. Section 1981 provides as follows:

Section 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State

> and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

4. The Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, 8 U.S.T. 899, TIAS 3853, provides in relevant part as follows:

> The United States of America and Iran, desirous of emphasizing the friendly relations which have long prevailed between their peoples, of reaffirming the high principles in the regulation of human affairs to which they are committed, of encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and of regulating consular relations, have resolved to conclude, on the basis of reciprocal equality of treatment, a Treaty of Amity, Economic Relations, and Consular Rights, and....

have agreed upon the following articles:

Article I

...4. Nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party. When any such national is in custody, he shall in every respect receive reasonable and humane treatment; and, on his demand, the diplomatic or consular representative of his country shall without unnecessary delay be notified and accorded full opportunity to safeguard his interests. He shall be promptly informed of the accusations against him, allowed all facilities reasonably necessary to his defense and given a prompt and impartial disposition of his case.

Article IV

1. Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair

their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.

2. Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

3. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either High Contracting Party located within the territories of the other High Contracting Party shall not be subject to entry or

molestation without just cause. Official searches and examinations of such premises and their contents, shall be made only according to law and with careful regard for the convenience of the occupants and the conduct of business.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SUSANA SIDERMAN DE BLAKE; JOSE SIDERMAN; CARLOS SIDERMAN; and LEA SIDERMAN;, individuals, Plaintiffs, vs. THE REPUBLIC OF ARGENTINA, a foreign country; THE PROVINCE OF TUCUMAN OF THE REPUBLIC OF ARGENTINA, a province of a foreign country; OSCAR HONORATO; ABELARDO GARCIA; CARLOS RASALES; VICTOR EDUARDO MOLINA; GENERAL DOMINGO BUSSI; CAPTAIN ABAS; GENERAL LINO MONTIEL FORZANO; GENERAL ANTONIO MERLO; individuals; INMOBILIARIA DEL NOR-OESTE, S.A., an Argentine corporation, Defendants.	No. CV 82-1772-RMT (MCx) ORDER RE: SUBJECT MATTER JURISDICTION AND PERSONAL JURISDICTION

This matter having come before the court for hearing on March 12, 1984 on the motion by plaintiff for default judgment, and this court having considered the pleadings and other documents filed herein and argument of counsel, and having found that this court has subject matter jurisdiction with respect to the claims for torture but that the act of state doctrine applies to the claims regarding the taking of property and having further found that there is personal jurisdiction over the other defendants,

IT IS ORDERED that a further hearing shall be held at 2:00 p.m. on April 2, 1984 on prove-up on damages with respect to plaintiffs' claims for torture as against defendants Republic of Argentina

and Province of Tucuman and that plaintiffs shall file their brief, supported by evidence, no later than March 22, 1984.

Dated: March 14, 1984

ROBERT M. TAKASUGI
ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE ROBERT M. TAKASUGI, JUDGE PRESIDING

- - -

SUSANA SIDERMAN DE BLAKE; JOSE SIDERMAN; CARLOS SIDERMAN; and LEA SIDERMAN; individuals, Plaintiffs, vs. THE REPUBLIC OF ARGENTINA, a foreign country; THE PROVINCE OF TUCUMAN OF THE REPUBLIC OF ARGENTINA, a province of a foreign country; OSCAR HONORATO; ABELARDO GARCIA; CARLOS ROSALES; VICTOR EDUARDO MOLINA; GENERAL DOMINGO BUSSI; CAPTAIN ABAS; GENERAL LINO MONTIEL FORZANO; GENERAL ANTONIO MERLO; individuals; INMOBILIARIA DEL NOR-OESTE, S.A., an Argentine corporation, Defendants.	C O P Y No. CV 82-1772-RMT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, March 12, 1984

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I N D E X

PROCEEDINGS: PAGE:

Monday, March 12, 1984

Hearing re Motion of Plaintiff for Default Judgment. 3

Court's Ruling on Motion. 4

LOS ANGELES, CALIFORNIA, MONDAY, MARCH 12, 1984; 9:30 A.M.

THE CLERK: Item No. 12 on the calendar, Civil 82-1772, Susana Siderman De Blake vs. The Republic of Argentina.

Counsel, state your appearances, please.

MR. BAZYLER: Good morning, your Honor. Michael Bazyler representing the plaintiffs.

I am here with Attorneys Scott Wellman and Professor --

MR. HOFFMAN: Paul Hoffman appearing for amicus curiae, ACLU Foundation of Southern California.

THE COURT: Good morning.

Are there any brief arguments that counsel wish to advance in this matter,

without being repetitive of the briefs filed?

MR. BAZYLER: Your Honor, if the Court is inclined to rule in our favor, I think we had tried to be very thorough in our papers.

THE COURT: Certainly.

MR. BAZYLER: If the Court is not, then we would like to hear the basis and speak on those.

THE COURT: With respect to the issue of subject matter jurisdiction as it pertains to the torture aspect, the Court does find subject matter jurisdiction by applying the "Law of Nations" concept.

Regarding subject matter jurisdiction as it pertains to the taking of

property, this matter should not be addressed because of the Act of State Doctrine.

Personal jurisdiction of the foreign sovereign is found by proper service under Section 1608(a) and that there is no need for personal jurisdiction for foreign sovereigns because of Section 1330(b).

Regarding the individual defendants, personal jurisdiction is not found because of the insufficient contacts. As we talk in terms of the notions of fair play and substantial justice, the bottom line resolve would be that there would be claims here regarding the torture claims as against Argentina and the Province of

Tucuman.

We should set up a schedule in terms of the second phase, and that would be one for damages. That hearing will be April 2, 1984, at 2:00 p.m., and you are required to file your briefs by March 22, 1984.

Thank you very, very much.

MR. HOFFMAN: Your Honor, may I just ask a question?

THE COURT: Yes.

MR. HOFFMAN: Have you granted the ACLU's application to appear as amicus curiae?

THE COURT: I will take a look at it, and you will be notified.

MR. HOFFMAN: Thank you very much, your Honor.

THE COURT: Thank you.

(End of proceedings.)

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT FROM THE STENOGRAPHIC RECORD OF PROCEEDINGS IN THE FOREGOING MATTER.

DONNA K. FITZSIMONS 3-14-84
DONNA K. FITZSIMONS, CSR DATE

Office-Supreme Court, U.S.
FILED
NOV 5 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-484

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

MARGO BERKOVITZ, AIDA BERKOVITZ, AND TRISTA BERKOVITZ,
Petitioners,

VS.

THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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16pp

QUESTION PRESENTED

1. Whether the Northern District of California and the Ninth Circuit Court of Appeals correctly concluded that United States courts lack subject matter jurisdiction pursuant to the Foreign Sovereign Immunities Act over this wrongful death action where the alleged death occurred in Iran.

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No. 84-434

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

MARGO BERKOVITZ, AIDA BERKOVITZ, AND TRISTA BERKOVITZ,
Petitioners,

VS.

THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals and the order of the District Court for the Northern District of California are identified in the Petition.

STATEMENT OF THE CASE

Petitioners are the heirs of Martin Berkovitz, an American businessman killed in Iran by a terrorist group (Kavir) in January, 1979, during the course of the Iranian revolution. Petitioners' amended complaint, filed in the Northern District of California, alleged that since Kavir's acts were motivated by anti-American and anti-Jewish sentiment and were intended to increase civil unrest and

turmoil in Iran and overthrow the then-existing political regime, the Islamic Republic of Iran (Iran) could be sued in the United States for the death; Kavir was alleged to be an agency or instrumentality of Iran.

The district court dismissed the amended complaint, upon Iran's motion, on the grounds that (a) Iran was immune from suit for the acts alleged under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602, *et seq.* (FSIA) and the court therefore lacked subject matter and personal jurisdiction, and (b) petitioners' claim had been settled pursuant to the international agreements which concluded the Iran hostage crisis and therefore the amended complaint failed to state a claim for relief. (Pet. A39-A41)

The Court of Appeals affirmed, concluding that neither the FSIA exceptions to the general sovereign immunity grant nor the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States (Treaty of Amity) provided a basis for jurisdiction over the action. (Pet. A20-A38) The Ninth Circuit did not consider the district court's alternative ruling that petitioners' claim had been settled by international agreement. (Pet. A38)

ARGUMENT

Petitioners raise before this Court five arguments, only one of which vaguely resembles what they timely raised, briefed, and argued below. The Ninth Circuit was presented with such issues as whether Iran had waived immunity, either impliedly because it was "unfriendly" to the United States or expressly through the Treaty of Amity (28 U.S.C. § 1605(a)(1)), and whether the fact that Martin Berkovitz went to Iran on business rendered immunity inapplicable

under the commercial activity exception of the FSIA (28 U.S.C. § 1605(a)(2)). None of these arguments, in the manner framed before the Ninth Circuit, are made here. Instead, petitioners claim that:

1. Foreign citizens can sue foreign states in American courts for acts of torture committed in the foreign state under the Alien Tort Statute (28 U.S.C. § 1350), and it would be inconsistent not to grant American citizens the same right.

2. Terrorism by Kavir was actually commercial activity which had the purpose and effect of disrupting trade relations between Iran and the United States.

3. Kavir can be considered both a foreign state and the subject of a foreign state and, if considered the latter, can be sued under general diversity principles.

4. Iran has not shown that it truly is recognized by the United States as a foreign sovereign.

5. Iran's claim to immunity could not be made by lawyers representing it.

Arguments 1 and 3 were first urged to the court of appeals in a petition for rehearing after the Ninth Circuit had already rendered its decision. Arguments 4 and 5 surfaced at the eleventh hour in petitioners' reply brief to the Ninth Circuit and therefore were not timely raised. And Argument 2 represents a "commercial activity" argument drastically different from that made to the Ninth Circuit. Since petitioners are actually asking this Court to consider *de novo* arguments not properly made below, rather than

requesting a review of the Ninth Circuit's decision, it is requested that the petition be denied summarily. *Cf. NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975).

Additionally, the issues raised are substantively meritless and the petition, for the reasons stated below, should be denied.

1. Equal access to the courts

Petitioners incorrectly state that the Ninth Circuit held that subject matter jurisdiction in a wrongful death action against Iran depends on the citizenship of the deceased. The Ninth Circuit opinion nowhere mentions citizenship as a factor; rather the Court considered only whether any of the exceptions to the general immunity grant of 28 U.S.C. § 1604 applied so as to vest jurisdiction in the district court. If Martin Berkovitz or his heirs had been aliens, the court would have been presented with precisely the same immunity issues. *Cf. Verlinden B.V. v. Central Bank of Nigeria*, ... U.S. ....., 76 L.Ed.2d 81, 103 S.Ct. 1962 (1983).

Petitioners argue, however, that under *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), a foreigner tortured in another country can sue his tormentors under the Alien Tort Statute (28 U.S.C. § 1350), but that an American citizen similarly tortured cannot. This is an overly simplistic analysis. The defendant in *Filartiga* was an individual who had no claim to sovereign immunity. Had the plaintiff there been an American citizen, he could have predicated jurisdiction against the same defendants for the same acts under general diversity principles (28 U.S.C. § 1332(a)(2)) and not even be bound by the Alien Tort

Statute's strict, and rarely satisfied, requirement that the tort rise to the level of a "violation of the law of nations or a treaty of the United States."

Petitioners imply, without explanation or analysis, that *Filartiga* also stands for the proposition that the Alien Tort Statute supports jurisdiction for suits against foreign state defendants as well, and that foreign states would be stripped of their FSIA immunity in such actions. Those questions were not before the *Filartiga* court, are not before this Court, and their answers are not nearly as self-evident as petitioners would lead us to believe.[1]

In the last analysis, however, even if petitioners are correct that an anomaly in the federal statutory scheme allows a foreigner tortured in a foreign state to sue the foreign state in America but disallows such actions by American citizens, their argument is one better addressed to Congress rather than the courts. The jurisdiction of

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[1]The Congressional intent appears to mandate that *any* action against a foreign state be governed by the FSIA to the exclusion of other statutes. This Court stated in *Verlinden, supra*, that "Congress clearly intended [the FSIA] to govern all actions against foreign sovereigns" (76 L.Ed2d at 90 n. 16) and that the FSIA "must be applied by the District Courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to sovereign immunity." (76 L.Ed.2d at 92)

But even if the Alien Tort Statute was interpreted as providing an alternative basis of jurisdiction against foreign states, it would seem highly likely that the act of state doctrine would preclude American courts from presuming to sit in judgment over claims by foreign citizens concerning acts of a foreign state occurring within the territory of the foreign state. *Cf. Underhill v. Hernandez* 168 U.S. 250, 252 (1897); *Intern. Ass'n of Machinists, Etc. v. OPEC*, 649 F.2d 1354, 1358-1361 (9th Cir. 1981).

federal district courts is limited to that which Congress has granted them by valid statute. *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 371-372 (1978); *Chase Manhattan Bank v. S. Acres Devel. Co.,* 434 U.S. 236, 239-240 (1978).

2. "Commercial activity" exception

The FSIA expressly provides that a foreign state is *not* immune in any case:

> in which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment. . . . [28 U.S.C. § 1605(a)(5).]

Apparently recognizing that since Martin Berkovitz's death clearly occurred in Iran Section 1605(a)(5) would not apply, petitioners have abandoned any attempt to urge that provision as even an arguable basis for subject matter jurisdiction. Rather they make a strained and rather convoluted argument that Kavir's acts of terrorism were commercial in nature and had the effect of disrupting trade relations between Iran and the United States. Jurisdiction, therefore, is said to exist under 28 U.S.C. § 1605(a)(2) which allows suit where the action is based:

> upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

The Ninth Circuit correctly pointed out that whether activity is "commercial" depends on the nature of the activity, not its purpose. That the purpose of Kavir's acts

was to disrupt trade is immaterial; the alleged murder was not a commercial activity. (Pet. A29-A31) Moreover, the "direct effect" of Kavir's acts—the death of Martin Berkovitz—occurred in Iran. Any alleged injuries to his heirs in America were indirect. (Pet. A30-A34) Therefore, neither requirement of the commercial activity exception relied upon by petitioners was satisfied.

3. Diversity jurisdiction over Kavir

Relying on *Lonon v. Companhia de Navegacao, Ect.*, 85 F.R.D. 71 (E.D. Pa. 1979), petitioners argue that Kavir's status as a foreign state under 28 U.S.C. § 1603 does not preclude it from also being considered a citizen or subject of a foreign state under the general diversity statute, 28 U.S.C. § 1332(a)(2).

Iran has never represented Kavir and does not purport to do so here.[2] The Court should be aware, however, that the *Lonon* case was effectively overruled by *Rex v. Cia. Peruana de Vapores, S.A.*, 660 F.2d 61 (3d Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). And every other Circuit which has considered the matter also has held that the FSIA provides the exclusive jurisdictional vehicle for actions against foreign states and that its provisions super-

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[2]Petitioners' statement that "Iran filed a motion for dismissal [with the district court] as to *both* Iran and Kavir" (Petition 3:11-12; emphasis supplied) is incorrect. Iran moved solely on its own behalf, but did point out through a footnote in its moving papers that since Kavir was alleged to be an agency or instrumentality of Iran, its immunities were coincident with Iran's. 28 U.S.C. § 1603(a).

cede and preempt traditional diversity jurisdiction. *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 586-587 (9th Cir. 1983), *cert. denied* October 8, 1984; *Goar v. Compania Peruana de Vapores*, 688 F.2d 417 (5th Cir. 1982); *Williams v. The Shipping Corp. of India*, 653 F.2d 875 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982); *Ruggiero v. Compania Peruana de Vapores, Etc.*, 639 F.2d 872 (2d Cir. 1981) (Friendly, J.).

4. Iran not a foreign state

The Berkovitz complaint affirmatively alleged that Iran "was and is a foreign state within the meaning of 28 U.S.C. § 1603(a)." Based on this allegation, the district court properly considered whether it had subject matter jurisdiction under the FSIA and concluded it did not. In their *reply brief* before the Ninth Circuit the Berkovitzes first asserted that Iran was *not* a foreign state and therefore was not entitled to sovereign immunity. The Ninth Circuit noted that this argument was untimely but dismissed it out of hand indicating that it had previously recognized Iran's status as a foreign state in *McKeel v. Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983), *cert. denied* October 8, 1984.

Indeed both the Executive branch and the courts have consistently recognized Iran as a sovereign entity. The Treaty of Amity has never been repudiated (*See, Sec. Pac. Nat. Bank v. Government and State of Iran*, 513 F.Supp. 864, 879 n.22 (C.D. Cal. 1981); *New England, Etc. v. Iran Power, Etc.*, 502 F.Supp. 120, 125 n.6 (S.D.N.Y. 1980), *remanded*, 646 F.2d 779 (2d Cir. 1981)) and the United States has recognized Iran as a foreign sovereign by entering into agreements concerning release of the hostages and

the termination of lawsuits brought by United States nationals in America against Iran (*Cf. American Intern. Group v. Islamic Republic of Iran*, 657 F.2d 430, 433-436 (D.C. Cir. 1981)). The United States additionally has urged Iran's sovereign immunity from suit, not only in this case,[3] but in others as well (*See, Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984), *cert. denied*, October 8, 1984; *McKeel v. Islamic Republic of Iran, supra*). To assert that the United States does not recognize the present Iranian government as a political sovereign is to ignore reality.

Moreover, petitioners fail to show what basis of federal jurisdiction would exist if Iran is deemed *not* to be a foreign state. Petitioners assume, incorrectly, that if an entity holding itself out as a foreign state is not recognized by the United States Government as such, that it can nonetheless be sued under the FSIA but without the immunities conferred by that legislation. Jurisdiction under the FSIA presumes in the first instance, however, that the party sued is a foreign state.

5. Presentation of immunity claim

Citing dictum from an intermediate state appellate court case decided 45 years before the enactment of the FSIA,

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[3]In footnote 3 at page 13, petitioners make the statement that the United States attorney specifically declared at oral argument that the United States does *not* recognize the Islamic Republic of Iran. Besides being unsupported, the statement is untrue. In fact, the United States filed a statement of interest with the Ninth Circuit in which it agreed entirely with Iran's immunity arguments, agreed that the district court properly dismissed the action for lack of subject matter jurisdiction under the FSIA, and urged the Ninth Circuit to affirm.

petitioners argue that only Iran's authorized representatives—not its attorneys—can urge sovereign immunity as a defense. Whatever the procedure for asserting the defense may have been before 1976, the FSIA makes plain that sovereign immunity is now a jurisdictional issue. *Verlinden, B.V. v. Central Bank of Nigeria,* ..... U.S. ....., 76 L.Ed.2d 81, 87 n.5, 103 S.Ct. 1962, 1967 n.5 (1983). Since subject matter jurisdiction is dependent on a finding of no immunity, courts may consider the issue *sua sponte* at any stage of the proceedings, even if no one appears on behalf of the foreign state, and even after a default has been entered. *See, e.g., Letelier v. Republic of Chile,* 488 F.Supp. 665 (D.D.C. 1980). As stated by this Court in the *Verlinden* case:

> The House Report on the Act states that 'sovereign immunity is an affirmative defense that must be specially pleaded'. . . . Under the Act, however, subject matter jurisdiction turns on the existence of an exception to sovereign immunity. . . . Accordingly, even if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the Act. [76 L.Ed.2d at 92 n.20; 103 S.Ct. at 1971 n.20]

Petitioners then cite a passage from *Olsen by Sheldon v. Government of Mexico,* 729 F.2d 641 (9th Cir. 1984) for the proposition that the foreign state bears the burden of proving immunity once a plaintiff alleges a proper basis of jurisdiction under the FSIA. Petitioners go so far as to represent that this proposition was a "holding" in *Olsen.* The cited passage, however, nowhere appears in the Ninth Circuit's reported decision; and, most certainly, it was not a holding of the *Olsen* court.

The issue of which party bears the burden of proving or disproving sovereign immunity was irrelevant in this case. For purposes of the motion to dismiss, Iran conceded the allegations in the Complaint, and the district court as it was required to do (*Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977); *Mark v. Groff*, 521 F.2d 1376, 1378 (9th Cir. 1975)), likewise treated those allegations as true. Since no facts were in dispute, the issue of burden of proof did not arise; rather, the matter was one of law for the court to decide, which it did correctly.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition be denied.

Dated: October 24, 1984

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